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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

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JOINT MOTION OF GTE CORPORATION

AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

In the Telecommunications Act of 1996, Congress outlined a plan for introducing competition into the local exchange that emphasized the primacy of private negotiations backed by arbitrations under state supervision. That system was designed to allow the application of localized expertise to individual cases. The rules adopted by the Commission under the Act, however, construct an exhaustive federal regulatory regime vastly extending the Commission's power and dictating terms for virtually every aspect of the agreements envisioned under the Act for introducing competition. In particular, the Commission has dictated pricing standards even though the Act reserves authority over pricing to the states and, in addition, the Commission has imposed a series of substantive requirements that go well beyond the terms of the Act.

Once the telecommunications industry is restructured to introduce local competition under the Commission's rules, it will be impossible to turn back the clock even if the rules are later struck down. Negotiations for private agreements under the Act will have been stifled by the terms set in the detailed regulations and the transformation of the industry will have been completed according to the Commission's uniform mold.

Accordingly, GTE and The Southern New England Telephone Company (SNET) request a stay of the Commission's rules pending judicial review. The four-factor test applied to stay requests clearly favors granting a stay in this case. See, e.g., Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

First, a petition for review is likely to succeed on the merits since the Commission's rules rest on a series of errors. In particular, by adopting detailed pricing standards for agreements under the Act, the Commission has exceeded its statutory authority and usurped a role specifically assigned by the Act to state commissions. See Telecommunications Act of 1996, Pub L. No. 104-104, § 252(d). The Commission's lack of power over pricing terms is further confirmed by the restrictions on the Commission's jurisdiction in § 2(b) of the Communications Act. See 47 U.S.C. § 152(b). Moreover, even if the Commission had authority to set prices, the standards it has chosen would force incumbent LECs to offer competitors interconnection, unbundled access, and resold services at below cost, and thus would accomplish an uncompensated taking in violation of the Fifth Amendment. The pricing standards thus violate the terms of the Act, which requires "just" and "reasonable" rates based on "cost."

In addition, in setting default proxy prices the Commission has acted arbitrarily and capriciously by failing to base the default ceiling it has chosen to the principles that must be followed in the cost study methodology it imposed on state commissions. Finally, the Commission has imposed a number of substantive requirements that violate the terms of the Act.

Second, GTE and SNET, as well as other incumbent LECs, will suffer irreparable harm in the absence of a stay. The Commission's unauthorized rules on both pricing and many of the substantive requirements of interconnection, unbundling, and resale will stifle the negotiation process Congress built into the Act before it even gets started. Once agreements are set in the mold dictated by the Commission, it will be impossible for parties to return to a blank slate and renegotiate the optimal arrangements that would be possible in the absence of the rules. Moreover, if incumbent LECs begin offering services to competitors under the below-cost pricing standards imposed by the Commission, they will immediately suffer unrecoverable losses in revenues, market share, and good will.

Third, a stay will cause no harm to others since private negotiations and state supervised arbitrations can proceed and ensure rapid progress toward implementing local competition under the Act even in the absence of the Commission's rules.

Fourth, the public interest favors a stay. Because the Act largely frees private agreements from the burden of compliance with the Commission's regulations, the transition to competition can proceed as Congress planned even if the Commission's rules are stayed. If the rules are not stayed, however, and are later struck down, there is a substantial risk that progress toward competition would be impeded by the disruptions in business plans that would follow upon widespread attempts to renegotiate agreements and readjust interconnection arrangements under modified rules.

Accordingly, GTE and SNET request that the Commission stay its rules in their entirety. In addition, given the immediacy and magnitude of the harm that the movants will suffer if the rules go into effect, the movants request that the Commission act on this motion as expeditiously as possible and in any event within 10 days. If the Commission has not acted within that time GTE and SNET intend to seek a stay from the Court of Appeals.

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INTRODUCTION

As the Commission itself has recognized, the Telecommunications Act of 1996 "fundamentally changes telecommunications regulation." First Report and Order ¶ 1. By ending over half a century of monopoly regulation of the local exchange, the Act requires a sweeping transformation of the telecommunications industry. At the same time, the Act holds out the promise of what Congress characterized as a "pro-competitive, deregulatory" system for fostering competition in all segments of the industry. The rules announced by the Commission, however, fall woefully short of fulfilling that promise.

Congress outlined a system for introducing local competition in which privately negotiated agreements, explicitly freed from many of the regulatory constraints of the Act, would be paramount. Arbitrations supervised by the states would fill in where private negotiations stalled, and would ensure that local expertise and individualized discretion could be applied to the myriad issues that might arise in paving the way for local competition. In place of that system, the Commission has created an exhaustive federal regulatory regime arrogating extensive power over local telecommunications to itself and under which both private negotiations and state arbitrations will be constrained by the uniform terms imposed by the Commission. In a scheme that clearly exceeds its authority under the Act, the Commission has thus prescribed standards to govern every detail of the transition to competition -- including even standards for pricing, an area particularly reserved to the states under the terms of the Act.

As a result, when the Commission's rules take effect, they will irretrievably alter the restructuring of the industry envisioned by the Act. By prescribing exhaustive standards for virtually every nuance of the agreements contemplated by the Act, the rules will set a baseline of minimum requirements that will curtail the scope of private negotiations and state arbitrations. If negotiations and arbitrations proceed under the rules, therefore, the transformation of local telecommunications will take place, not according to decisions made by parties in the market, nor even according to the localized decisions of state commissions in individual arbitrations, but rather according to the uniform mold cast by the Commission.

After that transformation is complete, there will be no going back. Even if the rules are later struck down, it will be a practical impossibility for parties to revisit the hundreds of issues in both negotiated and arbitrated agreements whose terms will have been effectively dictated by the rules. Nor will it be practicable for incumbent local exchange carriers (LECs) to reverse many of the costly reconfigurations in their networks that the rules will require, even if the rules are later found to exceed the requirements of the statute. Moreover, to the extent incumbent LECs begin offering services under the rules, the pricing standards set by the Commission -- which fail to allow full recovery of costs -- will ensure that incumbents suffer immediate and irreversible losses in revenues, market share, and goodwill.

Accordingly, GTE Corporation (GTE) and The Southern New England Telephone Company (SNET) respectfully request a stay of the effectiveness of the Commission's rules pending judicial review. Under the familiar four-prong test applied by the Commission, an application for a stay should be granted where the applicant can show (i) likelihood of success on the merits; (ii) irreparable injury absent a stay; (iii) the absence of harm to others if a stay is granted; and (iv) that the public interest favors a stay. See In re Deferral of Licensing of MTA Commercial Broadband PCS, 61 Fed. Reg. 19623 (May 2, 1996) (citing Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)). GTE and SNET readily satisfy each prong of this test.

First, GTE and SNET are likely to succeed on the merits because the Commission has committed a series of errors in promulgating the rules. In the first place, by imposing standards for the pricing of agreements under § 251, the Commission overstepped the bounds of its authority under the Act. The Act explicitly assigns state commissions, not the FCC, authority over pricing. That division of responsibility, moreover, is confirmed by the constraints imposed on the Commission's jurisdiction by § 2(b) of the Communications Act, which restricts the Commission's authority over intrastate communications.

In addition, even if the Commission had authority to regulate pricing, the standards it has chosen violate the terms of the Act. The Commission's pricing standard does not allow GTE, SNET, or other incumbent LECs to recover their true costs, including historical costs and a full measure of joint and common costs. By forcing incumbents to sell to competitors at a loss, the Commission's pricing rules would accomplish an uncompensated taking in violation of the Fifth

Amendment. As a result, the standard cannot be reconciled with the Act's commands that prices be "just and reasonable" and based on "cost."

Even apart from those errors, the Commission has acted arbitrarily and capriciously in setting default proxy prices for unbundled loops and for unbundled end office switching. After setting out one method for determining costs to be used in pricing, the Commission proceeded to set prices based on studies designed to capture a different measure of costs. Moreover, the Commission did so without reconciling the studies it used with either the methods it had announced or the proxy prices it ultimately chose.

Finally, in a range of additional specifics, the rules would impose national standards on the details of unbundling, interconnection, and resale that violate the plain meaning of the Act.

Second, GTE and SNET will be immediately and irreparably harmed if the Commission's rules become effective. By creating a baseline set of terms from which all negotiations will proceed, the Commission's detailed rules will unalterably change the system under which the restructuring of the telecommunications industry takes place. Once the industry has been remade under the dictates of the rules, there will be no practical way to start the process over again. It will be impossible to re-open hundreds of agreements and to recreate the industry once more in an atmosphere that allows the benefits of the free-ranging negotiation and decentralized, state-controlled arbitrations planned by Congress. In fact, after they spend millions implementing changes, it will not even be practicable for individual incumbent LECs to reverse many of the specific network engineering modifications they will have to implement to comply with extra-statutory substantive standards under the rules. Finally, the below-cost pricing imposed in the rules, by effectively subsidizing new entrants, will guarantee that GTE and SNET will suffer immediate and unrecoverable losses in revenues, market share, and customer goodwill.

Third, a stay will not harm others, because introducing competition in the local exchange can proceed immediately through the vehicles selected by Congress -- private negotiations backed by state arbitrations -- even without the Commission's rules in place.

Fourth, and finally, the public interest favors a stay. Precisely because the Act envisions private negotiations proceeding largely freed from the dictates of the Commission's rules, a stay will have no adverse effect on the public interest: the transition to competition will continue as Congress intended. Denying a stay, moreover, would create the risk that, if the regulations are later overturned, the entire industry would have to devote further resources to renegotiations, and in all likelihood progress toward creating full competition in the local market would be stalled.

Because the four factors outlined above clearly favor a stay, GTE and SNET request that the Commission stay its rules in their entirety pending judicial review. At a minimum, given that the Commission's pricing rules will be a primary source of immediate and irreparable harm, GTE and SNET request that the Commission enter a stay of the rules affecting pricing provisions.[1] In addition, due to the magnitude of the immediate harm that GTE and SNET will suffer if the rules become effective, GTE and SNET respectfully request that the Commission act on this application for a stay as expeditiously as possible and in any event within 10 days. If the Commission has not acted at the end of that time, GTE and SNET intend to seek a stay from the Court of Appeals.

[1]For example, such provisions would include, but not be limited to, the following: § 51.309; § 51.311(c); § 51.319(e)(3), (f), (g); § 51.501-51.514; §§ 51.607-51.611; §§ 51.705-51.717.

ARGUMENT

I. A PETITION FOR REVIEW IS LIKELY TO SUCCEED ON THE MERITS BECAUSE THE COMMISSION HAS EXCEEDED ITS STATUTORY AUTHORITY AND HAS ACTED ARBITRARILY AND CAPRICIOUSLY.

The Commission's rules rest on a series of errors that ensure the rules will be overturned in whole or in part upon review. In the first place, the Commission has no authority under the Act to promulgate rules governing pricing, since the Act assigns that responsibility specifically to the states. Even if it had authority to regulate pricing, moreover, the standard the Commission has chosen, Total Long Run Incremental Cost plus a so-called "reasonable" allocation for joint and common costs -- or "TELRIC plus" -- would accomplish an uncompensated taking of property in violation of the Fifth Amendment. The Commission's pricing rules thus violate the statutory command that rates be "just" and "reasonable" and based on "cost." In addition, the Commission has acted arbitrarily in setting default prices that are not themselves based on the methods the Commission has prescribed for determining rates. Even that series of errors, however, does not exhaust the list of legal infirmities underpinning the rules. In a series of substantive prescriptions concerning unbundling, interconnection and resale the Commission has imposed requirements that plainly exceed the mandates of the Act.

A. The Commission Lacks Authority Under the Act To Promulgate National Pricing Standards Governing Agreements Under Section 251 of the Act.

The Act establishes a program for introducing competition in the local exchange through privately negotiated agreements and through individual arbitrations overseen by state utility commissions. Localized, case-specific decisionmaking is thus the hallmark of the system Congress constructed for accomplishing the transition to competition. By imposing uniform national standards that address virtually every aspect of the agreements that might be reached under the Act, however, the Commission's rules will short-circuit this system before it has fairly started and thus will frustrate Congress's overall plan. In claiming such an expansive scope for its rules, moreover, the Commission has overstepped specific restrictions on its authority under the Act.

The Commission's clearest error lies in its decision to prescribe national pricing standards for agreements between incumbent LECs and competing carriers. The Act nowhere makes any mention of regulations to be issued by the Commission concerning pricing. To the contrary, the only support that could be gleaned from text of the Act for the authority to promulgate such rules is the requirement in § 251 that rates for interconnection and unbundled network elements be "just and reasonable." See Telecommunications Act of 1996, Pub.L. No. 104-104, §251(c)(2)(D), (c)(3). Based solely on this language and the general direction to promulgate implementing regulations, the Commission claims for itself a sweeping authority to set rates under the Act. See First Report and Order ¶¶ 111, 112, 115.

But the general language of § 251 can hardly be stretched into a grant of authority to the Commission to define rates. Section 251(d)(1) merely instructs the Commission to promulgate rules within six months on the subjects where it has been given authority. Simply by ordering expedited action the section in no way implies an expansion of the Commission's substantive mandate as defined in other provisions of the Act.

Moreover, nothing in § 251's general terms can plausibly be read as a grant of authority over pricing standards. To the contrary, Congress unambiguously assigned responsibility on that matter to state commissions elsewhere in the Act. In a section dedicated explicitly to addressing "Pricing Standards," Congress spelled out that it is state commissions that will "determin[e]" whether rates for interconnection and unbundled elements are "just and reasonable" as required by § 251. See § 252(d). Congress went on, indeed, to outline the standards that states should apply as it directed that "determinations by a State commission of the just and reasonable rate . . . shall be based on the cost . . . of providing the interconnection or network element . . . and may include a reasonable profit." § 252(d)(1). See also § 252(d)(3) (directing that state commissions should determine wholesale rates for resold services based on retail rates less avoided costs). Thus, while Congress explicitly set out guidelines to apply in setting rates, and specified the agencies that would apply them (state commissions), it conspicuously gave the FCC no role whatsoever in the process.

Contrary to the suggestion in the First Report and Order, the absence of any role for the Commission in setting prices is confirmed by § 252(c), which outlines the duties of state commissions in arbitrations under the Act. Section 252(c)(2) specifies that state commissions will "establish any rates for interconnection, services, or network elements," and that they shall do so "according to subsection (d)." Once again, there is no mention of any Commission regulation on pricing. Instead, the states' decisions are to be governed only by the instructions given directly by Congress in § 252(d).

The Commission's First Report and Order simply ignores the terms of § 252(c) in suggesting that the section requires state commissions addressing rates to "comply" with both the terms of § 252(d) and the Commission's regulations. See First Report and Order ¶ 118. It is true that § 252(c)(1) requires state commissions to ensure that substantive "conditions" generally imposed in arbitrations satisfy the Commission's regulations under § 251. But the section goes on to address pricing distinctly. Section 252(c)(2), a separate paragraph concerning states' responsibilities in "establish[ing] any rates," draws a sharp contrast to the preceding paragraph as it omits any reference to regulations issued by the Commission and directs state commissions solely to apply the standards set out in § 252(d) of the Act itself. The text and structure of § 252 thus could hardly make it plainer that Congress reserved responsibility for determining the reasonableness of prices to state commissions, not the FCC.

Further confirmation that the Commission lacks the authority it claims over pricing comes from § 2(b) of the Communications Act. Section 2(b) explicitly restricts the Commission's authority as it provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b) (1994). Under the plain terms of this section, the Commission does not have power to promulgate rules governing pricing for the type of agreements concerning local services that will be concluded under § 251, and indeed lacks any authority to regulate matters purely within the local exchange. This "congressional denial of power to the FCC" in § 2(b), moreover, could only be circumvented if Congress included "unambiguous" and "straightforward" language in the Act either modifying § 2(b) or at a minimum explicitly granting the Commission added authority. See Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355, 375, 377 (1986).

But no provision in the 1996 Act expressly modifies § 2(b) to grant the Commission authority to regulate either prices or other local matters under § 251. To the contrary, such a provision was expressly rejected by Congress, for while it was included in the Senate bill, it was not included in the law as enacted. See S. 652, 104th Cong., 1st. Sess. § 101(c) (1995). And as the Commission itself has acknowledged, § 251 includes no "explicit grant of intrastate authority to the Commission." First Report and Order ¶ 84. The section thus cannot be construed to override the unambiguous restrictions on the Commission's power in § 2(b).

Nevertheless, the Commission concludes that § 251 grants it authority to regulate not only pricing, but other aspects of intrastate services under the Act because, while the Act is not "explicit," First Report and Order ¶ 84, it simply "moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act." Id. ¶ 24; see also id. ¶ 83. And in the Commission's view, § 251 "should take precedence" over any "contrary implications" in § 2(b).

That reasoning turns the statute on its head. In the first place, § 2(b) cannot be dismissed as a mere "implication" about the Commission's power. The section states in terms that could not be more unequivocal that "nothing in this chapter shall be construed" to give the Commission authority over intrastate services. 47 U.S.C. § 152(b) (emphasis added). In contrast, § 251 includes only a general direction to expedite the promulgation of implementing regulations -- a direction that makes no mention of intrastate communications. See § 251(d). As the Supreme Court has explained, in such a case the unequivocal command in § 2(b) "provides its own rule of statutory construction" and requires that the explicit limitation on the Commission's power in § 2(b) must apply. Louisiana Pub. Serv. Comm'n, 476 U.S. at 377 n.5.

The Commission's only response to this authoritative construction of the Act is the suggestion that § 251 creates a "regulatory system that differs significantly from the dual regulatory system" under the 1934 Act and thus that the jurisdictional limitation in § 2(b) is simply no longer relevant. See First Report and Order ¶¶ 83, 97. But that circular reasoning provides no response at all to § 2(b). As the Supreme Court has explained, the very point of § 2(b)'s explicit command is that the Act may not be construed to alter or "move beyond" that section's jurisdictional limits without an unambiguous direction from Congress. The Commission has failed to point to any such direction in this case.

Moreover, the Commission's reading of § 251 to imply some change in the jurisdictional framework set by § 2(b) in itself rests on a further logical flaw. The Commission assumes that if § 251 addresses issues involving solely the local exchange, it must also necessarily imply a grant of full jurisdiction to the Commission to regulate the same matters. See First Report and Order ¶ 93. But there is no basis for that logical leap. Section 2(b), after all, is phrased in the disjunctive and directs that nothing in the Act should be construed to apply or to give the Commission jurisdiction over intrastate matters. While § 251 applies by its terms to some matters affecting solely intrastate communications, it nowhere explicitly assigns the Commission blanket authority over the same subjects. Since the Act clearly enlists the aid of state commissions to implement its mandates, there is no reason to assume that by merely addressing intrastate communications the Act effected, through silence, a wholesale rearrangement of the jurisdictional division between state and federal agencies underpinning the 1934 Act. In short, the mere fact that § 251 addresses intrastate services cannot, without some more explicit language overriding § 2(b), be read to confer authority on the Commission to regulate purely local matters. And the Act certainly provides no basis for upsetting § 2(b)'s jurisdictional limit with respect to authority over pricing, since the Act explicitly gives authority over that matter to state commissions.

Nor can it be argued that § 251 should be read to expand the Commission's jurisdiction on the theory that uniform national rules will promote the policies of the Act. Cf. First Report and Order ¶¶ 113, 114 (presenting policy justifications for national pricing standards); id. ¶ 84 (suggesting that it would "make little sense" to restrict the Commission's authority over intrastate matters). The Supreme Court has rejected precisely such an argument as a means for evading the jurisdictional constraints of § 2(b) since it would, in effect, permit the Commission to "confer power upon itself." Louisiana Pub. Serv. Comm'n, 476 U.S. at 374. See also id. at 374-75. ("[T]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress.").

B. The Act Cannot Be Construed To Authorize Use of the "TELRIC" Pricing Standard, Because That Standard Will Effect an Uncompensated Taking in Violation of the Fifth Amendment.

Even if the Act could be construed to give the Commission authority over pricing standards, the specific standard adopted by the Commission would violate the requirements under the Act that prices for interconnection and access to network elements be "just" and "reasonable," § 251(c)(2), (c)(3), and based on "cost," § 252(d)(1)(A), (d)(2)(A). These statutory commands can only properly be read to require that the rates be sufficient to avoid a taking of property without just compensation in violation of the Fifth Amendment. The Commission's methods for setting prices, however, plainly violate that standard. Whether the obligations imposed on incumbent LECs under the Act are considered under a regulatory takings analysis or are analyzed as a physical occupation of an incumbent LEC's property, the Commission's "TELRIC-plus" standard for setting rates would not provide constitutionally adequate compensation. Under either analysis, an incumbent LEC must be allowed to recover, at a minimum, its actual costs in its network, including historical costs and the full measure of its joint and common costs.

By mandating that incumbent LECs open their networks to interconnection and provide unbundled access at regulated prices, the Act raises the potential that incumbents will not receive fair compensation for the use of their property. It is well established, after all, that the "Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989).

The Act, however, states explicitly that rates should be "just" and "reasonable" and based on "cost." It goes almost without saying that these requirements demand compensation that is "just" under the standard of the Fifth Amendment. Under familiar principles of construction, the Act must be read to avoid the constitutional question that would arise if Congress had authorized the Commission to take property without providing just compensation. See, e.g., Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J. concurring). The Supreme Court, in fact, has recognized that if an "identifiable class of cases [exists] in which application of a statute will necessarily constitute a taking," concerns for avoiding uncompensated takings will properly require a narrowing construction of the act. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129 n.5 (1985). Cf. Bell Atl. Tel. Co. v. FCC, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (construing the Communications Act to avoid a potential takings issue).

Indeed, precisely to avoid running afoul of constitutional concerns, where an act of Congress specifies that a regulated business should be allowed a "just and reasonable" rate, such language is universally construed to require compensation sufficient to meet the constitutional standard. See, e.g., FPC v. Hope Natural Gas Co., 320 U.S. 591, 595 (1944); see also Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (explaining that Congressional standard "coincides with that of the Constitution"). The same construction must be applied to the 1996 Act.

For the pricing system under the Act to meet the requirement of "just" and "reasonable" rates, it must at a minimum allow incumbent LECs to recover all of their actual costs incurred in constructing and maintaining the networks that they must make available for public use. It is well settled that the Fifth Amendment requires that a regulated entity be allowed rates that will enable it to "maintain its financial integrity, to attract capital, and to compensate its investors" for the risks they assume. Duquesne, 488 U.S. at 310. If a LEC cannot recover the actual costs it has expended in building its network, it will not be able to provide a sufficient return to investors under this standard.

The Act, moreover, could hardly make it clearer that prices must allow full recovery of costs, since it directs explicitly that prices be based on "cost." § 252(d)(1). It plainly places an unnatural meaning on the word "cost" to construe the term to exclude a LEC's actual expenses in constructing its physical plant. And such a strained reading of the Act would clearly pass all legitimate bounds of interpretation when, precisely by excluding straightforward categories of "costs" from consideration, it would ensure that incumbent LECs would not be allowed a return that satisfies constitutional standards.

Full recovery of all costs must be provided, moreover, in each distinct segment of a LEC's business. It has long been settled that a regulated enterprise cannot be required to conduct a branch of its business at a loss on the theory that profits from another aspect of its business -- particularly an unregulated facet of its business -- will compensate for the confiscatory rates. See, e.g., Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396, 399 (1920) (Holmes, J.); see also Norfolk & W. Ry. Co. v. Conley, 236 U.S. 605, 609 (1915) (explaining that a common carrier may not be required to transport a "commodity or class of traffic" at "less than cost"). To the extent that prior rate cases have focused analysis instead on the overall return earned by an enterprise, their reasoning is limited to the unique situation presented in a regulatory framework involving comprehensive regulation of a monopolist. Cf. Duquesne, 488 U.S. at 314. In such cases, courts have focused on the total result of a pricing system in part because a monopolist enjoys regulatory protection against competition in various areas of its business. Accordingly, low rates in some areas might not be "confiscatory" where the monopolist enjoyed countervailing protections from competition, and thus was ensured higher rates, in other areas.

The Act, however, establishes a regime in which LECs are no longer protected monopolists, but rather are exposed to competition in all aspects of their businesses. See First Report and Order ¶ 1 (noting that for decades state and federal regulators have protected local exchange carriers from competitive entry but that "[t]he 1996 Act adopts precisely the opposite approach"). As a result, the Act must not be read to allow the Commission to require incumbent LECs to operate some segments of their businesses on a below-cost basis on the theory that profits from some other, protected line of business will ensure an overall "just" return. To the contrary, an incumbent LEC must be guaranteed an opportunity for a full recovery of costs in each part of its business subject to the Commission's pricing scheme.

A parallel constitutional analysis based on the physical taking accomplished in the Act yields the same conclusion -- rates under the Act must allow LECs full recovery of their actual costs. As the Commission itself has explained, the unbundling provisions of the Act will require incumbent LECs to surrender exclusive access to certain physical elements of their networks to competing carriers. See First Report and Order ¶¶ 258, 268. There can be no question that by thus forcing incumbent LECs to yield completely the use of their property, the Act accomplishes a physical taking. Cf. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (a "physical occupation authorized by government is a taking without regard to the public interests that it may serve"). While fair market value is typically used as the measure of just compensation for such a taking, the Supreme Court has long recognized that there is no "rigid rule" requiring that standard. Thus, where market value is "difficult to find," other standards may be appropriate. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). The guiding principle is that the victim of a taking be put in "as good a position pecuniarily as if his property had not been taken." Olson v. United States, 292 U.S. 246, 255 (1934).

Here, precisely because there is no established market for unbundled network elements, it would be difficult if not impossible to ascertain their market value. The Act itself suggests a substitute measure of value by directing that prices be based on cost, see § 252(d)(1), (d)(2), and reading that term to provide anything less than full recovery of costs would fail to provide adequate compensation for the taking of the LECs' property. Where resort must be had to costs as a measure of value, there can be no valid basis for arbitrarily excluding from the measure of cost the amounts actually paid for the property. Indeed, the Commission itself has recognized in the past that in some circumstances the book value of property may be the only viable method of